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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 756

ALFRED L. SEAVEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully presents:

I

Summary Statement of Matter Involved

Petitioner was convicted of perjury in violation of Section 231 of Title 18 of the United States Code, and judgment of sentence to imprisonment for a period of four months was imposed by Hon. George A. Welsh, United

States District Judge for the Eastern District of Pennsylvania. The judgment was affirmed by the United States Court of Appeals for the Third Circuit. The opinion of the Court is contained in the certified copy of the record filed with this Court (R. 36).

The record discloses the following salient facts:

Petitioner was tried on an indictment charging that on July 25, 1946, he testified before a Grand Jury of the United States that he did not make any payments to any officers or employees of the War Shipping Administration, and that he made no payments to Mr. Frank Sales. The indictment further charged that, in truth, petitioner did pay money upon one or more occasions to an employee or officer of the War Shipping Administration (R. 3a, 4a).

Government's Evidence

The official court reporter testified from the notes of the grand jury proceedings that petitioner had appeared before the Grand Jury and had testified that he had made no payments to any officers or employees of the War Shipping Administration and none to Frank Sales (R. 6a).

Wilhelmina Azzarano testified that she had been bookkeeper for Chemical Cleaning Process Company in 1942 and 1943, and that petitioner had been general manager. She identified a cashbook and testified that certain entries regarding checks for transactions with Chemical Cleaning Process Company were in her handwriting. With regard to an entry for August 17, 1942, she testified that petitioner had told her that it was a commission for the Maritime Commission. With regard to two entries for August 24, 1942, she testified that both were for commissions, and that petitioner had asked her to draw them. She identified four other entries for the years 1942 and 1943. Three of them were marked with an "S." She testified that "S"

stood for Frank Sales and that petitioner had told her that the cash was for Mr. Sales. She also testified that she had seen Fifty Dollars ($50.00) pass between petitioner and Sales at a Christmas Party at the Harbor Inn, Philadelphia, on December 24th 1944 (R. 7a, 8a).

Frank Sales, former marine surveyor and former assistant local manager of the United States Maritime Commission, testified that the only money he ever received from petitioner was One Hundred and Twenty-five Dollars ($125.00), which was handed him in an envelope in the Edison Hotel, Philadelphia, one day in November, 1944 (R. 10a).

At the conclusion of the testimony of Sales, the Government rested, and petitioner's motion for a judgment of acquittal, on the ground that the special rule applicable to perjury cases had not been complied with, was overruled (R. 10a), although Mr. Sales and Mrs. Azzarano had contradicted rather than corroborated each other, and the book entries had corroborated neither.

Defendant's Evidence

Petitioner categorically denied having paid any money and testified that he had testified truthfully before the Grand Jury (R. 11a).

Charge of the Court

The Court submitted the case to the jury on three different theories in the following order:

(a) The theory that the testimony of Mrs. Azzarano as to the Harbor Inn "payment" on December 24, 1944, coupled with the testimony of sales as to the Edison Hotel "payment" in November 1944 constitute the testimony of two witnesses within the meaning of the "two-witness rule" (R. 16a).

(b) The theory of defendant's points for charge, that (i) "some one single payment to Sales must be proved either by two witnesses or by one witness and corroborating circumstances," and (ii) the testimony of Mrs. Azzarano regarding the Harbor Inn "payment" coupled with the testimony of Sales regarding the Edison Hotel "payment" did not constitute the required proof of one single payment, and (iii) "Nor do Mr. Sales and Mrs. Azzarano constitute two witnesses to any one payment" (R. 19a).

(c) When the jury returned for further instructions the Court not only resubmitted the first theory, but also gave the case to the jury on a third theory, to wit that the books could constitute evidence corroborating the testimony of Mrs. Azzarano (R. 22a, 25a, 26a). Thus the Court said (R. 26a):

> "The Government also says that by reason of the books of the Company that employed the defendant, that it is corroboration; in other words, that Mrs. Wilhelmina Azzarano is corroborated by the books that she produces on these various dates in the course of business showing the payments that were made allegedly to give to a Government agent.
>
> That raises the whole question of fact for you, and if you believe that those payments were made by Mrs. Wilhelmina Azzarano to the defendant and that he gave those moneys to the Government witness, any or all of them, that would be a question for you to decide, and you could find him guilty on that."

An exception was properly noted (R. 23a, 24a, 27a).

A verdict of guilty was returned. A motion for judgment of acquittal, or a new trial, was denied. Petitioner was sentenced to four months in prison (R. 11a).

As related above, the United States Court of Appeals for the Third Circuit affirmed the judgment and sentence.

II

Basis of Jurisdiction

The jurisdiction of this Court is sustained by Section 1254 (1) of the Code of Judiciary and Judicial Procedure, 28 U. S. C. A. 1254 (1). The decision sought to be reviewed is a final judgment of the United States Court of Appeals for the Third Circuit, filed on March 17, 1950, affirming the judgment and sentence of the United States District Court for the Eastern District of Pennsylvania.

The questions involved are substantial because the Trial Court's instructions to the jury permitted a verdict of guilty of perjury upon the oath of a single witness, uncorroborated by circumstances.

III

Questions Presented

1. Is defendant guilty of perjury where in a judicial proceeding he testified that he never made any payments to a certain person and that person testifies to one payment in November, 1944, but says it was the only one, and another witness testifies to a different payment on December 24, 1944 and identifies book entries in her own handwriting allegedly relating to seven payments allegedly made in 1942 and 1943?

2. Is it reversible error in a perjury case to charge the jury that book entries which of themselves were irrelevant without explanation and which are explained only by the witness who made them furnish corroboration of other testimony of that witness sufficient to warrant conviction?

3. Is it reversible error to charge the jury that testimony by one witness as to one payment made to him by defendant plus testimony by another witness as to another payment

by defendant to the first witness warrants a conviction of perjury for having testified that no payment was made to the first witness?

4. As a matter of law can accomplices be deemed to corroborate each other?

IV

Reasons Relied upon for the Allowance of the Writ

Petitioner seeks the writ for the special and important reasons that the Court of Appeals has decided an important question of Federal law in a way probably in conflict with applicable decisions of this Court, and has sanctioned a departure by the District Court from the accepted special rule in perjury cases.

WHEREFORE, your Petitioner, Alfred L. Seavey, respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record of all proceedings therein; and that the order of the United States Court of Appeals for the Third Circuit, affirming the judgment and sentence, be reversed, and that your Petitioner have such other and further relief in the premises as to this Court may seem just and proper.

THOMAS D. MCBRIDE,
MICHAEL VON MOSCHZISKER,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

The opinion of the Court of Appeals is contained in the certified transcript filed with this Court (R. 36).

Statement of Jurisdiction, Questions Presented and Facts

For brevity these will not be repeated here. They appear in the petition to which this brief is annexed.

Argument

Conviction was permitted under erroneous instructions as to the special rule applying in perjury cases.

(a) *The Testimony*

The official court reporter Comer read his notes (R. 6a). They showed that defendant told the Grand Jury that he did not make any payments on his own behalf, or on behalf of Kunzig or anyone else, to any officers or employees of the War Shipping Administration, and that he did not make any such payments to Frank Sales. This is the only "testimony" which the indictment charged as being perjurious (R. 4a).

Mrs. Azzarano identified a cash book (R. 7a) as containing entries in her handwriting regarding checks drawn in connection with transactions with Chemical Cleaning Process Company. In themselves, the entries appeared perfectly innocent. With regard to an entry for August 17, 1942, Mrs. Azzarano testified, however, that Seavey had stated that it was a commission for the Maritime Commission (R. 7a). With regard to two entries for August 24, 1942 she testified that both were for commissions and that defendant had asked her to draw them. She identified four

other entries for 1942 and 1943 (R. 7a, 8a). Three of them were marked with an "S." She testified that "S" stood for Sales and that defendant had told her that the cash was for Mr. Sales. She also testified that she had seen $50 pass between defendant and Sales at a Christmas party at the Harbor Inn, Philadelphia, on December 24, 1944 (R. 8a).

Frank Sales testified that the only money he ever received from defendant was $125 which was handed him in an envelope in the Edison Hotel, Philadelphia, in November 1944 (R. 10a).

(b) *The Charge of the Court*

The Court submitted the case to the jury on three different theories in the following order:

The theory that the testimony of Mrs. Azzarano as to the Harbor Inn "payment" on December 24, 1944, coupled with the testimony of Sales as to the Edison Hotel "payment" in November, 1944, could constitute the testimony of two witnesses within the meaning of the "two-witness rule" (R. 16a).

The theory of defendant's points for charge, that (i) "some one single payment to Sales must be proved either by two witnesses or by one witness and corroborating circumstances," and (ii) the testimony of Mrs. Azzarano regarding the Harbor Inn "payment" coupled with the testimony of Sales regarding the Edison Hotel "payment" did not constitute the required proof of one single payment, and (iii) "Nor do Mrs. Sales and Mrs. Azzarano constitute two witnesses to any one payment" (R. 19a).

When the jury returned for further instructions the Court not only resubmitted the first theory, but also gave the case to the jury on a third theory, to wit, that the book entries in Mrs. Azzarano's handwriting, which had been authenticated, identified and explained only by her, constituted

evidence corroborating the testimony of Mrs. Azzarano (R. 22a, 25a, 26a). Thus the Court said (R. 26a):

> "The Government also says that by reason of the books of the company that employed the defendant, that it is corroboration; in other words, that Mrs. Wilhelmina Azzarano is corroborated by the books that she produces on these various dates in the course of business showing the payments that were made allegedly to give to a Government agent.
>
> That raises the whole question of fact for you, and if you believe that those payments were made by Mrs. Wilhelmina Azzarano to the defendant and that he gave those moneys to the Government witness, any or all of them, that would be a question for you to decide, and you could find him guilty on that."

An exception was properly noted (R. 23a, 24a, 27a).

(c) *The Law*

In *Weiler* v. *United States*, 323 U. S. 606, this Court held that it is error in a perjury case to refuse to charge that the testimony of one uncorroborated witness is not enough. At page 609, the Opinion of this Court indicated that what is needed is evidence specifically corroborating some one event testified to by the witness whose testimony is sought to be corroborated. Thus the Court said:

> "Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon 'an oath against an oath.'"

Furthermore, this Court said at page 610:

> "Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged per-

jurious statement; (2) that the corroborative evidence is trustworthy."

In petitioner's case, Mr. Sales testified that the only money he received was at the Edison Hotel in November of 1944, while Mrs. Azzarano testified that she saw Sales receive money from the defendant at the Harbor Inn on December 24, 1944. The witnesses contradicted each other. Indeed it appears that one of them perjured himself or herself. Therefore, they obviously did not substantiate or corroborate each other's testimony. Nor did the book entries corroborate either the testimony of Mrs. Azzarano or the testimony of Mr. Sales. For the book entries related to alleged payments in 1942 and 1943 only. Therefore, the test laid down in the Weiler case was not met. We maintain that the proper rule is that of *Lea* v. *The State,* 64 Miss. 278 (1886) cited at page 18 of *Johnson* v. *State,* 122 Miss. 16, which is cited with approval in the footnote at pages 626, 627 of *Hammer* v. *United States,* 271 U. S. 620, the case on which this Court relied in *Weiler* v. *United States, supra.* Lea had been indicated for falsely testifying that he had not unlawfully sold liquor to Cromwell, Gibson, Bowie or McDowell. In reversing judgment of conviction the Court said at page 283:

> "By the first instruction given for the State, the jury was permitted to treat the several and separate sales which different witnesses testified had been made by appellant, at different times, as corroborative evidence of each other. This was error. Proof of either assignment of perjury contained in the indictment, by two witnesses, or by one witness and corroborating circumstances, would have supported conviction; but the better opinion in such case is, that proof of one assignment is not corroborated by proof of another, even when all the perjuries assigned are committed at the same time and place. 1 Greenleaf on Evidence, Section 257 a;

Williams v. Com., 91 Pa. St. 493; Reg. v. Parker, 1 Car. & Marsh. 639."

In *Regina* v. *Parker,* 1 Car. & Marsh. 639, 174 Eng. Rep. 669, defendant was charged with perjury in that he stated in an affidavit that he had paid all the debts proved under his bankruptcy. Several creditors were called. Each proved the nonpayment of his own debt. A verdict of not guilty followed the charge of Tindal, C. J. who instructed the jury that there were not two witnesses to any of the debts mentioned in the indictment.

In *Williams* v. *Commonwealth,* 91 Pa. 493, the sheriff of Armstrong County had been convicted of perjury. The indictment alleged that in his oath of office he had sworn that he had made no illegal election expenditures. In reversing a conviction, the Court said at pages 501, 502:

> "The explanation ought to have been that the Commonwealth is required to prove by two witnesses or one witness, and corroborative evidence, at least one corrupt payment, contribution or promise which the defendant is charged with having made or paid; and, though each of several of such acts be proved by a single witness, if none be proved by two witnesses or by one witness, and corroborative proof of circumstances, there could not be a conviction. We think the learned judge so intended; yet it is urged that he permitted the jury to treat the several acts as corroborative of each other—they should have been clearly instructed that proof of a corrupt act by one witness was not corroborative evidence of another which was proved by a different witness."

In *United States* v. *Palese,* 133 F. 2nd 600 (Third Circuit), defendant had testified before the grand jury that he had not paid any person for voting. He was indicted for perjury. Wheatley testified defendant had given him $2 for his vote. Mrs. Jackson testified he had paid her for her

vote. In affirming a conviction the Court (Maris, J.) said at page 602 with regard to Mrs. Jackson's testimony:

> "It is true, as the defendant urges, that this testimony did not corroborate Wheatley's testimony that the defendant had paid him, Wheatley, for voting."

To that extent the *Palese* case supports our contention that Mrs. Azzarano and Sales did not corroborate each other.

But, in affirming the conviction, the Court also said at page 602:

> "But the payment to Wheatley, the individual, was not the crucial fact. Mrs. Jackson's testimony, if believed, did tend, as did Wheatley's, to establish the fact that the defendant did pay persons for voting. It, therefore, was sufficient to corroborate the only material fact established by Wheatley's testimony, namely, that the defendant's assertion that he had not paid any person for voting was false."

We submit that the decision in *United States* v. *Palese,* 133 F. 2d 600, is wrong and therefore defendant should be granted judgment of acquittal. If necessary we distinguish that case on the ground that it did not involve "corroboration" of one accomplice by another. But the decision is wrong anyway. Everybody agrees that where there is only one witness, the circumstances must corroborate the very facts that he testified to. On the same reasoning, where there are two witnesses one of them must corroborate the very facts that the other testified to. Mrs. Azzarano and Sales failed to do that.

Parenthetically we invite the attention of the Court to the fact that the *Palese* case was one of those relied on by the Court of Appeals in *United States* v. *Weiler,* 143 F. 2d 204, 206, fn. 5. The Court's decision in that case was reversed by this Court. 323 U. S. 606. It would appear that

departures from the special rule in perjury cases are not encouraged.

But, as we have already demonstrated, the Court permitted a verdict of guilty in petitioner's case on the theory that Mrs. Azzarano and Mr. Sales corroborated each other and, also, on the alternative theory that the books corroborated Mrs. Azzarano. We submit that both theories were wrong.

If either is wrong, it follows that defendant is entitled to a new trial. Where two alternative theories of guilt are submitted, one correct and the other incorrect, it is impossible to tell which the jury followed and hence the judgment must be reversed. *Kotteakos* v. *United States,* 328 U. S. 750; *Bollenbach* v. *United States,* 326 U. S. 607; *Williams* v. *North Carolina,* 317 U. S. 287; *Stromberg* v. *California,* 283 U. S. 359. This is particularly clear if the theory with regard to the books is incorrect. This was the theory that was given the jury after it had returned for further instructions. It seems clear that it must have confused the jury. The last instruction a jury receives is the one that it is most likely to remember. It is particularly important that such instructions be carefully weighed and properly stated. As this Court said in *Bollenbach* v. *United States,* 326 U. S. 607, 611:

> "The Government suggests that the judge's misconceived 'presumption' was 'just what it appears to be, a quite cursory, last-minute, instruction on the question of the necessity of knowledge as to the stolen character of the notes—and nothing more.' But precisely because it was a 'last-minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours. 'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its

> proper conduct and of determining questions of law.' Quercia *v.* United States, 289 U. S. 466, 469, 77 L. Ed. 1321, 1324, 53 S. Ct. 698. 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr *v.* United States, 153 U. S. 614, 626, 38 L. Ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.' ''

An additional reason why the books could not corroborate Mrs. Azzarano is that nobody had written anything in the books except Mrs. Azzarano. Nobody identified the books except Mrs. Azzarano. Nobody authenticated the books except Mrs. Azzarano. Nobody testified as to the entries except Mrs. Azzarano. Nobody testified as to what "S" stood for except Mrs. Azarrano. Nobody explained or interpreted the books except Mrs. Azzarano. Nobody linked defendant with the entries or with the cash transfers for which the entries allegedly stood except Mrs. Azzarano. Unexplained by the testimony of Mrs. Azzarano the books demonstrate nothing. Therefore, to permit the books to corroborate Mrs. Azzarano is to allow her to corroborate herself and hoist herself by her own bootstraps and this the law does not permit.

In support of our position we cite the following case:

In *Regina* v. *Boulter,* 5 Cox. Cr. C. 543 (Court of Criminal Appeal, 1852), an indictment for perjury alleged that the defendant falsely swore that only one quarter's rent was due from him to his landlord in June, 1851. The landlord swore that five quarters' rent was due at that time and produced a book kept by himself in which were entries of the transactions made at the time of their occurrence. Held, conviction quashed. At page 546 Coleridge, J., said of the idea that the

book could corroborate the witness "It is corroborating him by himself."

Nor do the books corroborate Sales. They indicate nothing with regard to the money he said defendant gave him in 1944.

And there is an additional reason why Mrs. Azzarano and Mr. Sales cannot have corroborated each other. They were accomplices of defendant and of each other. Sales because he allegedly received the money from defendant, Mrs. Azzarano because she allegedly supplied defendant with money and disguised its purpose on the books knowing that it was to be given to Sales. See *Commonwealth* v. *Polise,* 81 Pa. Super. 69, 73.

As a matter of law accomplices cannot be deemed to corroborate each other. Therefore, the testimony of Mrs. Azzarano coupled with the testimony of Sales is not sufficient for a conviction of perjury and it was error to charge that it was sufficient.

As authority for the rule that accomplices cannot corroborate each other, we cite the following:

Commonwealth v. *Simon,* 44 Pa. Superior Ct. 538, 541-543, in which the Court said:

> "The second paragraph is as follows: 'As to the second ordinance, there of course, was the testimony of Stewart that he had talked to Mr. Simon before; that he had told him that there would be money in this for him, and he would get more than the others. I think he said he had arranged with him as to the amount, or told him the amount. At any rate, he says he knew that Simon came to his place for the purpose of getting money, and the money had been put in an envelope there, and that is the last he knew of it. He said whether he got the money he could not positively say, but he knew that he had gone, and that the envelope was gone. That of course, is very positive corroboration, if you believe it.'

It is a conceded fact in the argument that the Stewart above referred to was an accomplice of Klein and the above quotation from the charge raises the very important question of whether one accomplice corroborates another, or, in other words, where two accomplices testify in support of a criminal charge against a third person, can the court say to the jury that one accomplice corroborates the other. We find that many of the text-writers, as well as the authorities in this state, and in several of our sister states, are strongly against the charge of the court to the effect that Stewart's testimony corroborated Klein.

In 1 Greenleaf on Evidence, sec. 381, it is said: 'If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied and the same confirmation is required as if there were but one.' In 3 Wigmore on Evidence, sec. 2059, note A: 'It is clear, as to testimonial source of the corroboration, that it must be independent of the accomplice himself; it must rest on other than his credit. It is usually said that the testimony of another accomplice is not sufficient; yet the circumstances may sometimes render it sufficiently trustworthy.' See also Taylor on Evidence, sec. 970; Underhill on Criminal Evidence, sec. 75. In Com. *v.* Clemmer, 190 Pa. 202, the same doctrine seems to have been recognized by our Supreme Court. In that case the defendant's thirteenth point was, 'The testimony of Elizabeth DeKalb and Charles C. Kaiser, Jr., both being self-confessed accomplices, cannot be considered by the jury as corroborating each other; the testimony of each must stand alone, and it would be unsafe to convict the prisoner on such testimony unless such testimony is corroborated by other facts and circumstances independent of the testimony of both.' The court below so instructed the jury and the opinion of the Supreme Court appears to approve the same.

Our own case of Com. *v.* Craig, 19 Pa. Superior Ct. 81, clearly recognizes that the testimony of accomplices should be corroborated and if not, then the jury should be advised that it is unsafe to convict on such uncor-

roborated testimony. In Cox *v.* Com., 125 Pa. 94, Mr. Justice Paxson, for the Supreme Court, said: 'The learned judge below did his full duty, under all the authorities, in cautioning the jury as to the danger of convicting upon the uncorroborated evidence of an accomplice. He was not bound to instruct them to acquit in the absence of corroboration.' Many additional cases might be cited from other states to the effect that if two or more accomplices are produced as witnesses, they are not deemed to corroborate each other. We, therefore, conclude that the learned judge erred in his instruction to the jury as set forth in the paragraph above quoted from the fourth assignment to the effect that the testimony of Stewart was, of course, very positive corroboration, if you believe it. So much of the fourth assignment as is above quoted is sustained."

See also Commonwealth *v.* Chrostowski, 112 Pa. Super. 466, 468, 469, 171 A. 901; Wigmore, 3d Ed., Volume VIII, Section 2059 at page 326; Wharton's Criminal Evidence, 11th Ed., Volume II, Section 749 at page 1262.

Conclusion

The testimony of Sales and Mrs. Azzarano contradicted each other, for the former testified that the *only* payment was in one place in November, 1944, while the latter testified to a payment alleged to have been made in another place on December 24, 1944.

The book entries did not substantiate the testimony of either witness, for all book entries related to transactions in 1942 and 1943.

THEREFORE, certiorari should be granted. *Weiler* v. *United States,* 323 U. S. 606.

Respectfully submitted,

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